

JAN 28 1993

OFFICE OF THE CLERK

No. 92-515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF AMICI CURIAE OF THE CALIFORNIA
ASSOCIATION OF HUMAN RIGHTS ORGANIZATIONS,
CENTER FOR DEMOCRATIC RENEWAL, COMMUNITY
UNITED AGAINST VIOLENCE, HUMAN RIGHTS/FAIR
HOUSING COMMISSION OF THE CITY AND COUNTY OF
SACRAMENTO (CALIFORNIA), INTERNATIONAL
ASSOCIATION OF OFFICIAL HUMAN RIGHTS
AGENCIES, LOS ANGELES COUNTY HUMAN RELATIONS
COMMISSION, NATIONAL ASSOCIATION OF HUMAN
RIGHTS WORKERS, NATIONAL VICTIM CENTER,
NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE
PROJECT, NORTH CAROLINIANS AGAINST RACIST AND
RELIGIOUS VIOLENCE AND SANTA CLARA COUNTY
(CALIFORNIA) HUMAN RELATIONS COMMISSION
IN SUPPORT OF PETITIONER

Henry J. Silberberg
Counsel of Record
Mark Solomon
Brian Levin
Stroock & Stroock & Lavan
2029 Century Park East, 18th Floor
Los Angeles, California 90067
(310) 556-5800
Attorneys for Amici Curiae

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

-i-

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Legislatures Have Legitimate, Reasonable And Content-Neutral Justifications For Enacting Bias Crime Penalty Enhancement Statutes	4
A. Excessive Violence	4
B. Random and Irrational Nature	6
C. Multiple Offenders	7
D. Serial Nature	9
E. Risk of Social Disorder	11
F. Limits Exercise of Civil Rights	13
G. Effect on Victims	19
H. Adverse Effect on Community	20
I. Cumulative Terroristic Effect	21
J. Requirement of Additional Resources ..	22
II. Discriminatory Conduct Can Be Regulated Without Punishing Beliefs Or In Any Way Implicating The First Amendment	23
III. Notwithstanding The Presence Of Any Expressive Component, Acts Of Violence And Threats Are Not Protected By The First Amendment	25
IV. Conduct With An Expressive Element Can Be Regulated Even In The Absence Of Discrimination Or Violence	27
CONCLUSION	29

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986)	29
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983)	26
<i>Barnes v. Glen Theatre, Inc.</i> , ___ U.S. ___, 111 S.Ct. 2456 (1991)	27
<i>Boos v. Barry</i> , 485 U.S. 312 (1988)	26
<i>Brown v. Board of Education of Topeka</i> , 347 U.S. 483 (1954)	16
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	20
<i>Dawson v. Delaware</i> , ___ U.S. ___, 112 S.Ct. 1093 (1992)	26, 27
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	26
<i>Griggs v. Duke Power Company</i> , 401 U.S. 424 (1971)	18

<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241 (1964)	14
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968)	14
<i>Milk Wagon Drivers U. v. Meadowmoor Dairies</i> , 312 U.S. 287 (1941)	25
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	25
<i>Payne v. Tennessee</i> , ___ U.S. ___, 111 S.Ct. 2597 (1991)	19
<i>R.A.V. v. St. Paul</i> , ___ U.S. ___, 112 S. Ct. 2538 (1992)	4, 16, 28, 29
<i>Renton v. Playtime Theaters, Inc.</i> , 475 U.S. 41 (1986)	27, 28
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	14, 23, 24
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	25
<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	25
<i>State of Wisconsin v. Mitchell</i> , 169 Wis. 2d 153 (1992)	2

<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	24, 26, 29
<i>United States v. Rock Royal Co-op., Inc.</i> , 307 U.S. 533 (1939)	13
<i>Watts v. United States</i> , 394 U.S. 705 (1969)	26, 28

STATUTES

18 U.S.C. § 871	28
42 U.S.C. § 2000a	13
42 U.S.C. § 2000e	18
Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992)	3
Hate Crimes Statistics Act of 1990, Pub. L. 101-275	3
Wis. Stat. § 939.645(1)(b)	2

OTHER REFERENCES

Anti-Defamation League of B'nai B'rith, <i>ADL Law Report, ADL in the Courts:</i> <i>Litigation Docket 1991, Fall 1991</i>	3
--	---

<i>Black and White: A Newsweek Poll</i> , Newsweek, March 7, 1988 at 23	15
Boston Police Department, <i>Community Disorders</i> <i>Unit Incident Breakdown 1978 to 1991</i> in Boston Police Dept., 1991 Yearly Report, Feb. 4, 1992	10
Boston Police Department, <i>Community Disorders</i> <i>Unit Monthly Reports (1991)</i>	12
Boston Police Department, <i>Community Disorders</i> <i>Unit, Unpublished Tables</i>	16
Bureau of Justice Statistics Bulletin, No. NCJ-92326, <i>The Severity of Crime (Jan. 1984)</i>	6
Chicago Commission on Human Relations, <i>Bias</i> <i>Crime Report (1989)</i>	14
Community United Against Violence, <i>Statistical</i> <i>Analysis (January-March 1992)</i>	8
G. Comstock, <i>Violence Against Lesbians and</i> <i>Gay Men (1991)</i>	6
G. Croug, <i>Police Say Laguna Beating Was Hate</i> <i>Crime</i> , L.A. Times, Jan. 11, 1993	5
D. deLeon, Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, Nov. 15, 1992	12

L. Duke, <i>With Gun and Flame, A Hate Crime Begins</i> , Wash. Post, Jan. 6, 1993	5
B. Flynn, Telephone Interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Units (Nov. 12, 1992)	10
J. Garofalo, <i>Bias And Non-Bias Crimes In New York City: Preliminary Findings</i> , Unpublished Paper (1990)	7, 22, 23
D. Goleman, <i>As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism</i> , N.Y. Times, June 29, 1990	8
Governor's Task Force on Bias-Related Violence, Final Report (1988)	11, 15, 17
M. Henneberger, <i>For Bias Victims, A Double Trauma</i> , N.Y. Newsday, Jan. 9, 1992	20
G. Herek & K. Berrill (ed.), <i>Hate Crimes Confronting Violence Against Lesbians and Gay Men</i> (1992)	8, 9, 20
Kelling & Moore, <i>Evolving Strategy of Policing, Perspectives on Policing</i> No. 4, Nov. 1988	21
J. Kifner, <i>Police Brace for Riots in Brooklyn</i> , N.Y. Times, Aug. 24, 1991	23

S. Labaton, <i>Poor Cooperation Deflates F.B.I. Report on Hate Crime</i> , N.Y. Times, Jan. 6, 1993	8
Law Enforcement News, <i>Decoy Cops Take the Lumps to Sting Houston Gay Bashing</i> , Sept. 30, 1991	6
V. N. Lee, <i>Legislative Response to Hate - Motivated Violence: The Massachusetts Experience And Beyond</i> , 25 Harv. C.R. - C.L. L. Rev. (1990)	10
B. Levin, <i>Bias Crimes: A Theoretical And Practical Overview</i> , forthcoming 4 Stan. L. & Pol'y Rev.	5, 6, 7, 8, 22
J. Levin and J. McDevitt, <i>Hate Crimes: The Rising Tide Of Bigotry And Bloodshed</i> , forthcoming Spring 1993	5, 6, 7, 11, 16, 17, 22
Los Angeles County Commission on Human Relations, <i>Intergroup Conflict in Los Angeles Schools</i> (1989)	17
Maryland State Police Criminal Intelligence Division: <i>Hate/Bias Incident Assessment</i> (1991)	7
J. McDevitt, <i>The Study Of The Character Of Civil Rights Crimes In Massachusetts (1983-1987)</i> (November 1989) (Paper presented to the American Society of Criminology on file with the author)	9, 14

National Institute Against Prejudice & Violence, <i>The Ethnoviolence Project</i> , Institute Report No. 1 (1986)	9
National Institute Against Prejudice & Violence, <i>Campus Ethnoviolence: A Research Review</i> (1992)	18
National Institute Against Prejudice & Violence, <i>Ethnoviolence on Campus: The UMBC Study</i> (1987)	18
National Institute Against Prejudice & Violence, <i>Ethnoviolences At Work</i> (1992)	18
National Institute Against Prejudice & Violence, <i>National Victimization Survey</i> , 1989	19
New Jersey State Police, 1991 Bias Incident Report (1992)	20
New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992)	12
New York City Police Department, Bias Incident Investigating Unit, Tables for Patrol Borough Brooklyn South 1991	16

<i>Nightline: Violent Hate Crime Against Gays</i> (ABC television broadcast, Jan. 26, 1990)	6
Note, <i>Fighting Words and Fighting Freestyle: the Constitutionality of Penalty Enhancement for Bias Crimes</i> , 93 Colum. L. Rev. 178 (1993)	10
Office of the Attorney General, California Department of Justice, Commission on Racial, Religious, Ethnic and Minority Violence: Final Report (1990)	13
Pomerantz, <i>The FBI and Terrorism</i> , FBI Law Enforcement Bulletin, Oct. 1987	21
L. Richardson, <i>61 Acts of Bias: One Fuse Lights Many Different Explosions</i> , N.Y. Times, Jan. 28, 1992	12
Smothers, <i>Blacks in White Areas Are Found Focus of High Rate of Crimes</i> , N.Y. Times, April 28, 1990	15
Southern Poverty Law Center, <i>Move-In Violence: White Resistance to Neighborhood Integration in the 1980's</i> , Special Report (1987)	15
Stroock & Stroock & Lavan, <i>1992 National Law Enforcement Survey of Bias Crimes</i> (1993)	3

-x-

J. P. Stevens, Associate Justice, United States Supreme Court, Remarks at Yale Law School, October 27, 1992	29
L. Tribe, <i>American Constitutional Law</i> (2d ed. 1988) § 12-7	26
U.S. Commission on Civil Rights, <i>Intimidation and Violence: Racial and Religious Bigotry in America</i> (1983, 1990)	11
U.S. Department of Justice, <i>Report to the Nation on Crime and Justice</i> , 2d Edition, March 1988	21, 22
Weinstein, <i>First Amendment Challenges to Hate Crime Legislation</i> , 11 Crim. Just. Ethics 10 (1992)	22, 25
C. Wexler and G. T. Marx, <i>When Law And Order Works</i> , 32 Crime & Delinquency 205 (1986)	9, 10

No. 92-515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF AMICI CURIAE OF THE CALIFORNIA
ASSOCIATION OF HUMAN RIGHTS ORGANIZATIONS,
CENTER FOR DEMOCRATIC RENEWAL, COMMUNITY
UNITED AGAINST VIOLENCE, HUMAN RIGHTS/FAIR
HOUSING COMMISSION OF THE CITY AND COUNTY OF
SACRAMENTO (CALIFORNIA), INTERNATIONAL
ASSOCIATION OF OFFICIAL HUMAN RIGHTS
AGENCIES, LOS ANGELES COUNTY HUMAN RELATIONS
COMMISSION, NATIONAL ASSOCIATION OF HUMAN
RIGHTS WORKERS, NATIONAL VICTIM CENTER,
NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE
PROJECT, NORTH CAROLINIANS AGAINST RACIST AND
RELIGIOUS VIOLENCE AND SANTA CLARA COUNTY
(CALIFORNIA) HUMAN RELATIONS COMMISSION
IN SUPPORT OF PETITIONER

Amici, enumerated above, with the consent of the
parties, submit this brief in support of reversal of the
judgment of the Wisconsin Supreme Court in the
proceeding below.

INTEREST OF *AMICI CURIAE*

Amici constitute a variety of government agencies and national and state civic organizations which provide legal, educational, victim support and other services regarding bias crimes and related matters. *Amici* have a substantial interest in demonstrating the constitutionality of bias crime statutes because of their central role in eradicating acts of bias violence. Individual descriptions of the agencies and organizations are set forth in the accompanying Appendix at pp. 15-18.

SUMMARY OF ARGUMENT

The Wisconsin Criminal Code provides for enhanced punishment when the State proves that a convicted criminal "[i]ntentionally selects the person against whom the crime . . . is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . ." Wis. Stat. § 939.645(1)(b).

The Wisconsin Supreme Court incorrectly held that the Wisconsin statute violates the First Amendment because it punishes "what the Legislature has deemed to be offensive thought. . . ." *State of Wisconsin v. Mitchell*, 169 Wis. 2d 153, 163 (1992). The statute represents a legitimate exercise of the State's police power to protect the health, safety and welfare of its citizens and does not, in any way, impermissibly infringe upon First Amendment rights. First, even if the First Amendment is somehow implicated by the Wisconsin statute, there are legitimate,

content-neutral justifications for authorizing enhanced penalties for bias offenses which override any concern that free speech might be inhibited. Bias crimes are a criminologically distinct category of offenses that create special and quantifiable harms to society. There is a national consensus that the unique harms justify enhanced penalties for offenders.^{1/} It is of grave national concern that bias crimes are rising dramatically.^{2/} As shown herein, criminologists have concluded that bias crimes (1) are particularly disruptive to individuals and communities, (2) require a greater application of police resources, and (3) are most often committed to deter whole groups of people from exercising rights relating to housing, employment and public access. Conventional criminal statutes do not address the unique evils that bias crimes pose. Second, and in any event, the proscription of pernicious discriminatory or violent conduct, which the State has a legitimate interest in eradicating, does not in any way implicate the First Amendment.

^{1/} Forty-six states have enacted statutes that target bias crimes. Anti-Defamation League of B'nai B'rith, *ADL Law Report, ADL in the Courts: Litigation Docket 1991*, Fall 1991. The federal Hate Crimes Statistics Act of 1990, Pub. L. 101-275, mandates data collection regarding bias crimes. See also The Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992).

^{2/} Ten representative jurisdictions have reported an average increase in bias crimes of 24.4% in 1992. Stroock & Stroock & Lavan, *1992 National Law Enforcement Survey of Bias Crimes* (1993). This survey and other prominent studies are presented graphically in the Appendix. Klanwatch also reports an increase in bias homicides for 1992. Letter from Joseph Roy to Brian Levin (Jan. 22, 1992).

ARGUMENT

I. Legislatures Have Legitimate, Reasonable And Content-Neutral Justifications For Enacting Bias Crime Penalty Enhancement Statutes

States have clear interests, wholly unrelated to any expressive content associated with particular conduct, in targeting bias crimes for heightened penalties. As Justice Stevens stated in *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992):

Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption, *such threats may be punished more severely*. . . .

Id. at 2561 (emphasis added).

A. Excessive Violence

Bias crimes are more violent than non-bias crimes. Indeed, bias crimes are at least three times more likely to involve criminal assault than non-bias crimes. These assaults are twice as likely to cause injury and four times

more likely to result in hospitalization than non-bias assaults.^{3/} Unlike crimes based on personal conflict or pecuniary gain, there is little a victim can do to lessen the severity of such an attack. Bias crime victims cannot easily appease an attacker by turning over property or by apologizing for past conduct. The violent purpose behind the crime generally eliminates the opportunity for a victim to lessen his or her injury through any meaningful act of compliance.

Bias crime assaults and homicides are not more severe solely because of the extent of the injuries, but also because of the depravity of the attacks. Victims are often not merely beaten, but severely tortured. For instance, during the first two weeks of 1993, an African-American tourist in Florida was doused with gasoline and set ablaze,^{4/} while in California hate crime charges were filed in the case of a man who was beaten so severely that authorities could not even ascertain his race.^{5/} Researchers, police and emergency medical professionals

^{3/} See B. Levin, *Bias Crimes: A Theoretical And Practical Overview*, 4 Stan. L. & Pol'y Rev. 165, 166 (Winter 1992-1993) (hereinafter "*Bias Crimes*"), and J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide Of Bigotry and Bloodshed* at 15, forthcoming Spring 1993 (hereinafter "*Hate Crimes*"). (Copies of "*Hate Crimes*" have been lodged with the Court and provided to counsel for the litigants.)

^{4/} L. Duke, *With Gun and Flame, A Hate Crime Begins*, Wash. Post, Jan. 6, 1993, at A3.

^{5/} G. Croug, *Police Say Laguna Beating Was Hate Crime*, L.A. Times, Jan. 11, 1993, at A1.

throughout the country recount with disturbing regularity multiple stab wounds and strikes, dismemberments, castrations, skull fractures, mutilations, strangulations and immolations suffered by bias assault victims.^{6/} The Houston Police Department abandoned an undercover anti-gay hate crime decoy operation after only ten days because five officers were injured after being attacked with baseball bats, tree limbs and fists in four separate incidents.^{7/}

B. Random and Irrational Nature

The irrational nature of bias crimes is particularly disruptive and threatening both to victims and to the community. Compared to conventional crimes, bias crimes are far more likely to be committed randomly against victims by complete strangers.^{8/} Criminologists have concluded that there is far greater societal disruption from random acts of violence than there is from those violent acts which have some rational cause.^{9/} The disruption to society is of enormous significance when whole groups of citizens are placed in constant fear of

^{6/} *Nightline: Violent Hate Crime Against Gays* (ABC television broadcast, Jan. 26, 1990). A study of gay homicide victims over a five-year period reveals similar findings. G. Comstock, *Violence Against Lesbians and Gay Men* 47 (1991).

^{7/} *Decoy Cops Take the Lumps to Sting Houston Gay Bashing*, Law Enforcement News, Sept. 30, 1991, at 3.

^{8/} *Bias Crimes* at 167; *Hate Crimes* at 16.

^{9/} *Hate Crimes* at 17; Bureau of Justice Statistics Bulletin, No. NCJ-92326, *The Severity of Crime* (Jan. 1984).

random violence from attackers with whom they have no direct connection.

C. Multiple Offenders

Bias crimes are at least twice as likely to involve multiple offenders acting in concert, often against a single victim. Nationally, approximately 25% of violent crimes are committed by two or more offenders.^{10/} An analysis of the jurisdictions having the most credible bias crime statistics reveals the disproportionate involvement of multiple offenders.

In Maryland, 71% of the bias crime cases involved multiple offenders.^{11/} The comparable figures for New York City and Boston, respectively, were 75% and 64%.^{12/} The Boston study reveals that most attacks involved four or more perpetrators and a lone victim.^{13/} The conclusions of private researchers are in accord with these law enforcement figures. Numerous studies of large numbers of anti-gay cases, for example, reveal that multiple offender attacks account for between 48 to 78%

^{10/} *Bias Crimes* at 167; *Hate Crimes* at 21.

^{11/} Maryland State Police Criminal Intelligence Division: *Hate/Bias Incident Assessment* 17 (1991).

^{12/} J. Garofalo, *Bias and Non-Bias Crimes In New York City: Preliminary Findings*, at 16 (manuscript, 1990) (hereinafter "Garofalo"); *Bias Crimes* at 4.

^{13/} *Hate Crimes* at 22.

of the victimizations.^{14/} Such violent group conduct presents unique dangers because: (1) offenders are empowered by the heightened sense of dominance and exhilaration that results from group action; (2) individual offenders lose a sense of direct accountability for actions that occur at the hands of a group; and (3) the group offers anonymity.^{15/} An analysis of lynchings in the first part of this century revealed that "the larger the mob, the more atrocious and savage the lynching and the more likely [it is] to include burning or mutilating the victim."^{16/} More recently, many of the most publicized bias homicides involved uncontrolled group attacks on lone victims. Such violence by disorderly crowds

^{14/} G. Herek & K. Berrill (ed.), *Hate Crimes Confronting Violence Against Lesbians and Gay Men* 21 (1992) (hereinafter "Herek & Berrill"); Community United Against Violence, Statistical Analysis (January-March 1992).

Contrary to publicly available reports that look to the results from multiple jurisdictions, the F.B.I., in a preliminary release of its first hate crime survey, reported that most bias incidents occur one-on-one. As shown *infra*, however, this conclusion is not reflected in the data from those jurisdictions upon whose long-standing reporting systems the F.B.I. program was modeled. It is important to note also that it takes a number of reporting cycles for a hate crime reporting system to achieve the operational efficiency necessary to draw such conclusions; this phenomenon is known as "reporting effect." See *Bias Crimes*, at 171-3, and S. Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, N. Y. Times, Jan. 6, 1993, at A8.

^{15/} D. Goleman, *As Bias Crime Seems To Rise, Scientists Study The Roots Of Racism*, N.Y. Times, June 29, 1990, at C5.

^{16/} *Id.*

frequently results in more severe injuries, greater community disruption and a disproportionate diversion of scarce police resources.

D. Serial Nature

Numerous well respected studies find that a common characteristic of bias crimes is the presence of related serial victimizations, most of which go unreported. Two studies of Boston bias crimes revealed a pattern of multiple victimizations, starting with minor incidents which often lead to more serious offenses.^{17/} In a 1986 study of racial, religious and ethnic victimizations the National Institute Against Prejudice and Violence revealed that 65% of victims experienced "multiple interconnected attacks," with an additional 17.5% experiencing multiple attacks in discrete incidents.^{18/} Another influential study of anti-gay attacks revealed that 68% of those who had been threatened with violence and nearly half (47%) of those who had been physically assaulted reported multiple experiences of such episodes.^{19/}

^{17/} Jack McDevitt, *The Study Of The Character Of Civil Rights Crimes In Massachusetts* (1983-1987), at 3 (July 1989) (Paper presented at the American Society of Criminology) (hereinafter "*The McDevitt Study*" a copy of which has been lodged with the Court); C. Wexler and G. Marx, *When Law And Order Works*, 32 *Crime & Delinquency* 205, 208 (1986) (hereinafter "*Law and Order*").

^{18/} National Institute Against Prejudice & Violence, *The Ethnoviolence Project*, 5 (1986) (hereinafter "*Ethnoviolence Project*").

^{19/} Herek & Berrill at 21; *Bias Crimes* at 168.

Clearly, conventional criminal statutes do not adequately deter bias crimes.^{20/} Before the passage of Massachusetts' bias crime statute, the Boston Police Department consistently responded to repeat bias crimes committed either against the same victims, by the same perpetrators, or both. The first case prosecuted in the state under this statute involved a group of individuals whose members had been repeatedly arrested for committing criminal acts against the same group of minority families.^{21/} After Boston began widespread enforcement of the statute, repeat incidents dropped significantly and the overall level of reported bias crimes in Boston fell by two-thirds.^{22/} As the U.S. Commission on Civil Rights observed in a 1983 report:

Effective police responses . . . are necessary to keep such [bias] incidents from spreading. If the police fail to respond or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret

^{20/} See generally *Law and Order*, V. N. Lee, *Legislative Response to Hate-Motivated Violence: The Massachusetts Experience And Beyond*, 25 Harv. C.R.-C.L. L. Rev. (1990); Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178 (1993).

^{21/} Telephone interview with Brian Flynn, Detective Sergeant, Boston Police Department, Community Disorders Unit (Nov. 12, 1992).

^{22/} See *Law and Order* at 212; *Community Disorders Unit Incident Breakdown 1978 to 1991* in Boston Police Dept., 1991 Yearly Report, Feb. 4, 1992.

the police inactivity as official sympathy or even sanction.^{23/}

E. Risk of Social Disorder

The interchangeability of victims based merely upon perceived status heightens the social disruption associated with bias crimes. The substitutable nature of the victimization places entire classes of people on notice that they face a threat over which they have little meaningful control.^{24/} The potential for conflict that flows from this characteristic of bias crimes creates particularly explosive situations, where one incident can lead to a series of related acts of random inter-group retaliation. A New York State task force recently concluded that "[a] single incident can be the tragedy of a lifetime to its victim and may be the spark that rends and disrupts an entire community."^{25/}

Bias-related tensions, particularly those involving race, have consistently sparked this nation's most violent and disruptive civil disorders. Ample evidence illustrates how one incident can spark a series of incidents of

^{23/} U.S. Commission on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* 17 (1983, 1990).

^{24/} *Hate Crimes* at 20.

^{25/} Governor's Task Force on Bias-Related Violence, *Final Report* at E.S. 10 (1988) (hereinafter "*New York Report*").

random retaliation.^{26/} The law enforcement data show that generally significant increases in the reported number of bias crimes within one city can be attributed to a large number of localized incidents or by an increase in the number of incidents occurring between members of two specific status groups involved in a trigger incident.^{27/} These data indicate that a single incident can aggravate intergroup tensions and lead to a cycle of violent and criminal behavior.

^{26/} According to police, perpetrators commonly refer to the initial incidents as their motivation for committing subsequent offenses. A notable example occurred in the Bronx in January 1992, after two minority youths were beaten, robbed, smeared with white sneaker polish and told it was "their day to be white." L. Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. Times, Jan. 28, 1992, at B1. The borough experienced more bias crimes in January than in the previous four months combined. New York City as a whole experienced two and one-half times the number of bias crimes in January than it had in December. New York City Police Department, Bias Incident Investigating Unit, Incident Report (1992). The mayor, additional police and social service personnel were summoned to the area to diffuse tension in the community. Telephone Interview with Dennis deLeon, New York City Commission on Human Rights, Nov. 15, 1992.

^{27/} For example, in August 1991, 34 bias crimes were reported in Boston, compared to 16 cases in July and 10 cases in September of 1991. Of the 34 reported incidents, 10 occurred within a single police district; 8 of these 10 occurred in a housing project where the trigger incident took place. All these incidents involved solely whites and Hispanics. Boston Police Department, Community Disorders Unit Monthly Reports (1991). Were these increases in the number of reported incidents due merely to an increased efficiency in the reporting of all bias incidents of all types, we would not expect to see increases limited to these specific status or geographic categories.

F. Limits Exercise of Civil Rights

The government has a clear interest in promoting the rights of its citizens to open, non-discriminatory travel, housing, educational and employment opportunities. However, bias crimes are distinctive because they directly and forcefully interfere with the exercise of such civil rights. A California state commission observed, "When acts of hate violence are prosecuted under other [general] laws, those laws typically address only specific criminal acts involved, such as vandalism or assault without regard to the civil rights they violate."^{28/}

i) Travel

Just as the federal government has a legitimate interest in regulating discriminatory conduct in interstate travel under the Commerce Clause, the states themselves have legitimate interests in regulating such conduct with respect to intrastate travel. The Court stated in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 569, 570 (1939), "[t]he authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the States over intrastate commerce." Thus, the Court approved objective of Title II of the Civil Rights Act of 1964: "... to vindicate the deprivation of personal dignity that surely accompanies

^{28/} Office of the Attorney General, California Department of Justice, Commission on Racial, Religious, Ethnic and Minority Violence: Final Report 46 (1990).

denials of equal access to public establishments"^{29/} -- is an objective that the states may legitimately advance.

Bias crime victims are often simply travelling when attacked. A recent study of the Boston Police Department's bias crime data shows that the majority of bias offenders committed their crimes merely because an individual was driving, working, passing through or moving into a neighborhood. The study found, "[t]he lack of public access to certain neighborhoods in our cities is a truly serious problem."^{30/} A 1989 Chicago report was in accord with the Boston study, revealing that 56% of bias crimes in the city over a two year period involved travel or relocation into a hostile neighborhood or the use of a public facility by the victim.^{31/}

ii) Housing

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that it was permissible for Congress to bar all racial discrimination, both private and public, in the sale or rental of property. As shown below, bias crimes directly interfere with the housing rights that Congress has sought to protect. The New York State Governor's Task Force on Bias-Related Violence has reported that:

^{29/} *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984), citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

^{30/} *The McDevitt Study* at 9.

^{31/} Chicago Commission on Human Relations, *Bias Crime Report* 4 (1989).

Attempts to deprive minorities of equal access to housing through harassment, intimidation, threats, vandalism, arson and other acts of violence persist and have intensified. This is true 20 years after the enactment of the Federal Fair Housing Act and the extension of the New York State Human Rights Law to non-public housing more than 25 years ago.^{32/}

Fewer than one-half of the white respondents in a 1988 Newsweek poll said they preferred to live in a racially mixed neighborhood.^{33/} The presence of minorities in ethnically changing neighborhoods frequently results in criminal victimization. A 1987 study concluded that "[m]inority families are at risk in many communities from hard-core racists who see their all-white neighborhoods as the last bastions of segregation."^{34/} Demographic changes which affect the composition of neighborhoods is yielding a repeating pattern which results

^{32/} *New York Report* at 242.

^{33/} *Black and White: A Newsweek Poll*, Newsweek, March 7, 1988, at 23.

^{34/} Southern Poverty Law Center, Special Report, *Move-In Violence: White Resistance to Neighborhood Integration in the 1980's* (1987); Smothers, *Blacks in White Areas Are Found Focus of High Rate of Crimes*, N.Y. Times, April 28, 1990, at A1.

in outbreaks of bias violence when minority integration reaches a certain level, usually between 20-25%.^{35/}

Justice Blackmun concluded in *R.A.V.*, "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes . . ." 112 S.Ct. at 2561.

iii) Schooling

In *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court recognized that the opportunity of a state education must be available to all on equal terms. The Court stated:

To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. *Id.* at 494.

^{35/} Boston police were able to discern a repeating pattern of a significant increase in bias crimes when housing projects were integrated to a certain level. Boston Police Department Community Disorders Unit, Unpublished Tables (lodged with the Court). Similarly, in 1991 minority integration in Canarsie, Brooklyn had reached 25% when the firebombing of an "integrationist" real estate office touched off a series of attacks resulting in more bias crimes in a three week period in the area than in the previous six months. *Hate Crimes* at 95-98; New York City Police Department, Bias Incident Investigating Unit, Tables for Patrol Borough Brooklyn South 1991.

Tragically, however, schools and colleges are becoming increasingly identified by new research as one of the most common areas where bias crimes occur, thus threatening, *de facto*, the protections afforded by *Brown* (and also stigmatizing those groups not embraced by the *Brown* decision). A nationwide 1990 Harris poll of high school students found over half the respondents said they witnessed racial incidents at least once in a while, and some "very often." Almost half said they either approve of such attacks or would participate in one. In a further disturbing survey by the State of New York of almost three thousand junior and senior high school students, 43% have witnessed acts of bias violence at school, 16% have been victims and 8% have been injured.^{36/} A 1989 Los Angeles County school survey of 956 responding institutions revealed that in addition to many non-criminal bias incidents, 1,237 acts of reported physical violence, graffiti and property damage took place in a single school year.^{37/} A 1987 study by the National Institute Against Prejudice and Violence of the University of Maryland-Baltimore County revealed that in a single school year, over 5% of the students were harassed, threatened, physically attacked, or experienced property destruction motivated by racial, religious or ethnic animus. According to the National Institute, 20% of minority college students

^{36/} *Hate Crimes* at 136; *New York Report* at ES 8-9.

^{37/} Los Angeles County Commission on Human Relations, *Intergroup Conflict in Los Angeles Schools*, 10-11 (1989).

are either assaulted or harassed and these acts are increasing significantly.^{38/}

iv) Employment

In *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971), the Court opined that in enacting Title VII of the Civil Rights Act of 1964, Congress required "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The National Institute has found that the workplace is one of the most common locations for bigoted abuse and crimes; 27% of all such incidents, according to the Institute, occurred at work. Disturbingly, the study also found that 39% of all acts of criminality or abuse at the workplace are motivated by prejudice. The Institute found that demographic changes, economic shifts, increased competition, and resentment are responsible for existing underlying tensions and that these conditions will continue.^{39/} The report concluded:

Ethnoviolence in the workplace is prevalent and costly for employers and employees, and for victims as well as non-victims who

^{38/} National Institute Against Prejudice & Violence, *Ethnoviolence on Campus: The UMBC Study*, 16 (1987); *Campus Ethnoviolence: A Research Review* (1992).

^{39/} National Institute Against Prejudice & Violence, *Ethnoviolences At Work*, 26 (1992).

are their colleagues. Not only does ethnoviolence have a demoralizing impact on the work force . . . but it also deprives large numbers of people of the right to earn a living in a non-threatening atmosphere.^{40/}

G. Effect on Victims

The effects of a specific crime on a specific victim are highly relevant considerations for the judge in determining an appropriate punishment. See *Payne v. Tennessee*, __ U.S. __, 111 S.Ct. 2597 (1991). *Mutatis mutandis*, the probable effects of a type of crime are highly relevant considerations for the legislature in determining the appropriate range of sentencing available to the judge. Such consideration in the area of bias crimes reveals that their heightened deleterious effects render appropriate heightened punishment. In a study by the National Institute Against Prejudice And Violence, researchers concluded that victims of bias-type attacks suffered 21% more adverse psychological and physiological symptoms than victims of the same crimes that were not bias-related.^{41/} Another study by the National Institute's Ethnoviolence Project concluded that "[m]any victims fear for their safety and for their family's safety . . . many of them report changes in their lifestyle -- where they walk, how they answer the phone and the

^{40/} *Id.* at 32.

^{41/} National Institute Against Prejudice & Violence, *National Victimization Survey*, 1989.

... fear can disrupt totally the lives of some victims."^{42/} A National Gay & Lesbian Task Force study revealed that 83% of gay and lesbian respondents expected future victimization and 62% feared for their safety.^{43/} Part of the distinct trauma bias crime victims experience results from their unique vulnerability together with the degradation that is experienced when attacked for a characteristic that is central to one's identity. Distressingly, many victims are youths who are at a stage in life where the emotional impact from such attacks is particularly severe and long-lasting.^{44/}

H. Adverse Effect on Community

The Court noted in *Coker v. Georgia*, 433 U.S. 584, 598 (1977), that because rape "undermines the community's sense of security, there is public injury." Bias attacks also create such "public injury" because they undermine any sense of security the community may have in freedom from such crimes. Criminologists have found that disorderly or threatening conduct within a community, rather than direct violent victimization, is far more

^{42/} *Ethnoviolence Project* at 6-9.

^{43/} Herek & Berrill at 20.

^{44/} M. Henneberger, *For Bias Victims, A Double Trauma*, N.Y. *Newsday*, Jan. 9, 1992, at 113. See also New Jersey State Police, 1991 Bias Incident Report, 7 (1992) showing that more victims belong to the 11 to 17 age group than any other. Other jurisdictions show that children constitute a substantial percentage of those who are victims of bias crimes.

responsible for the fear and anxiety felt by most citizens.^{45/} This public, communal suffering is as relevant as any individual suffering that might occur as a result of these crimes and, of itself, is sufficient justification for penalty enhancement. "[P]eople who have not been personally victimized may be strongly affected when they hear how others have been victimized."^{46/} Bias crimes affect the community in a peculiarly pernicious way. Bias crimes diminish community cohesion by breeding fear and suspicion of criminality in a way which establishes the potential for further conflict between status groups. Such potential is typically absent with respect to crimes of a more general nature.

I. Cumulative Terroristic Effect

According to the FBI, terrorism is "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives."^{47/} The fact that bias crimes are more likely to involve excessive violence, random and serial attacks, multiple unknown offenders and a high risk of social disorder makes such offenses especially threatening to victims and to their immediate community. As one

^{45/} Kelling & Moore, *Evolving Strategy of Policing*, Perspectives on Policing No. 4, November 1988, at 8.

^{46/} U.S. Department of Justice, *Report to the Nation on Crime and Justice*, 2d ed., March 1988, at 24 (hereinafter "*Report to the Nation*").

^{47/} Pomerantz, *The FBI and Terrorism*, FBI Law Enforcement Bulletin, Oct. 1987, at 14-15.

commentator has noted, "The effect of Kristallnacht on German Jews was greater than the sum of the damage to buildings and assaults on individual victims."^{48/} Accordingly, criminologists regard these offenses as being terroristic.^{49/}

J. Requirement of Additional Resources

Bias crimes require a disproportionate allocation of government resources.^{50/} This is because it is both more difficult to apprehend perpetrators and harder to control the resulting social unrest which can follow such incidents. Because of the frequent lack of a direct personal connection between the parties and the lack of tangible evidence, such as stolen property, it is more difficult for police to effect arrests in bias crime cases. Arrest rates for bias crimes are generally less than 25%,^{51/} even though at least half of them involve direct physical confrontation.^{52/} In contrast, the overall arrest rate for violent crimes is about 48%.^{53/} These differing arrest rates cannot be attributed simply to a lack of police effort in investigating bias crimes. In New York City, 85% of

^{48/} Weinstein, *First Amendment Challenges to Hate Crime Legislation*, 11 Crim. Just. Ethics 10 (1992) (hereinafter "Weinstein").

^{49/} *Hate Crimes* at 214.

^{50/} Garofalo at 17-18.

^{51/} *Bias Crimes* at 167.

^{52/} *Id.* at 3.

^{53/} *Report to the Nation* at 69.

bias crimes received follow-up investigative time of more than a month, while only 2% of non-bias crimes did. New York City police filed 3 or more investigative reports in 93% of the bias cases, but only 7% of the non-bias cases resulted in 3 or more report filings.^{54/}

Moreover, when intergroup tensions are ignited, they often require a substantial law enforcement presence to control. After a fatal mixed-race auto accident in Brooklyn in August 1991, 1,500 police officers were needed to contain the resulting riots, which lasted for four days and resulted in 180 arrests.^{55/}

II. Discriminatory Conduct Can Be Regulated Without Punishing Beliefs Or In Any Way Implicating The First Amendment

The Wisconsin statute does not criminalize beliefs. Rather, it regulates a form of discriminatory conduct -- the intentional selection of a victim based on his or her status. As such, the Wisconsin law falls squarely within the category of regulation, expressly approved by this Court, that addresses the "unique evils" caused by invidious discrimination. As the Court held in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

[A]cts of invidious discrimination . . . cause unique evils that government has a

^{54/} Garofalo, Comparison Table.

^{55/} J. Kifner, *Police Brace for Riots in Brooklyn*, N.Y. Times, Aug. 24, 1991, at A27.

compelling interest to prevent -- wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to *no constitutional protection*.

Id. at 628 (emphasis added).^{56/}

Criminal activity motivated by prejudice can be no more protected under the First Amendment than is discrimination in the areas of housing, employment, education, freedom of association and public access. The Wisconsin statute simply and narrowly targets such criminal activity. It is entirely appropriate for a state, in the administration of criminal justice, to punish and deter discriminatory violence by enacting a statute that gives

^{56/} The *Roberts* Court assumed that the relevant state statute, which forbade discrimination in access to public facilities on the basis of race, color, creed, religion, disability, national origin or sex, met the test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), viz., that the regulation furthers an important governmental interest, that the interest is unrelated to the suppression of free expression and that the incidental restriction on First Amendment freedoms is no greater than necessary to further the government interest. *Id.* at 377. But even were the Wisconsin statute to focus on the expressive content of a crime rather than on the method by which the criminal selects a victim, it would still pass constitutional muster. As demonstrated above, the "secondary effects" of bias crimes provide an independent basis for enforcing the constitutionality of such penalty enhancement provisions. See § I, *supra*.

clear notice to the public of the relevant conditions and penalties. See *Screws v. United States*, 325 U.S. 91, 105, 109 (1945). Discriminatory selection of a victim or even bias animus can be "taken into account by a legislature in enhancing punishment for hate crimes when relevant to any of the considerations that the state may legitimately look to in formulating the degree of punishment for a crime."^{57/}

III. Notwithstanding The Presence Of Any Expressive Component, Acts Of Violence And Threats Are Not Protected By The First Amendment

"The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Because violent acts and threats run counter to the purposes of the First Amendment guarantee of freedom of speech, this Court has consistently allowed the government to regulate such conduct. "[In] back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind." *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941). The fact that a threat or act of violence has an expressive component does not diminish the government's authority to punish an offender. Violence and threats simply are not afforded constitutional protection. As the Court noted in *Spence v. Washington*, 418 U.S. 405, 409 (1974):

[I]t is . . . necessary to determine whether [the] activity was sufficiently imbued with

^{57/} Weinstein at 8.

elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."^{58/}

It has already been determined that crimes of violence involving status-based discrimination may be punished more severely than otherwise without offending First Amendment principles. In *Barclay v. Florida*, 463 U.S. 939, 949 (1983), this Court ruled that the defendant's racial hatred and desire to start a race war was relevant to the propriety of a capital sentence. Recently, in *Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093, 1097 (1992), the Court declared: "We therefore conclude that the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations simply because those beliefs and associations

^{58/} See also *Watts v. United States*, 394 U.S. 705 (1969) (the government may constitutionally punish bona fide threats against the President provided that it does not make viewpoint based differentiations); *Boos v. Barry*, 485 U.S. 312, 331 (1988) ("where demonstrations turn violent, they lose their protected quality as expression under the First Amendment," quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)). As Professor Tribe noted in *American Constitutional Law* (2d ed. 1988) § 12-7 at 828, n. 18, "[T]he Court . . . has been reluctant to concede that the First Amendment has any relevance whatsoever to political assassination, radical bank robberies, or other violent modes of expression."

are protected by the First Amendment." The Court openly suggested that "Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs." *Id.* at 1098. The Wisconsin statute does avoid the problem by requiring proof beyond a reasonable doubt of intentional selection.

IV. Conduct With An Expressive Element Can Be Regulated Even In The Absence Of Discrimination Or Violence

Aside from their interest in eradicating discriminatory or violent conduct against their citizens, states often have other substantial reasons, unrelated to expression or belief, to regulate conduct which has an expressive element.

In *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986), this Court ruled that a zoning ordinance that restricted the location of adult movie theaters was constitutional because it "aimed not at the [expressive] content . . . but rather at the secondary effects. . . ." The Court pointed to the ordinance's purpose "to prevent crime . . . and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts and the quality of urban life. . . ." Similarly, in *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456 (1991), the Court held that a total ban on nude dancing was constitutional, notwithstanding any free expression interests, because states have legitimate interests in protecting public order and morality. Justice Scalia, in a concurring opinion, concluded that general laws regulating

conduct and not specifically directed at expression do not violate the First Amendment. *Id.* at 2465.

In *R.A.V.*, while holding unconstitutional a local ordinance which prohibited the display of certain symbols, the Court nonetheless reasoned that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. Indeed, the *R.A.V.* Court expressly approved longstanding precedent allowing the government to make content based prohibitions in three specific instances.

First, the Court recited that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 2545. The Court differentiated between permissible content discrimination and impermissible viewpoint discrimination by examining laws which prohibit threats of violence against the President. 18 U.S.C. § 871.^{59/} Second, citing *Renton*, the Court reaffirmed that differential treatment of content based groups is permissible if the disparate treatment is based on the "secondary effects" of the speech and not the expressive

^{59/} The Federal government may constitutionally punish threats against the President because of the potential for significant societal disruption. *Watts v. United States*, 394 U.S. 705, 707 (1969). The government, however, is not allowed to punish threats solely because those threats implicate a particular point of view. *R.A.V.*, 112 S.Ct. at 2546.

content. *Id.* at 2546. Third, the Court recognized that the states have broad authority to discriminate based on content when "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547.^{60/}

CONCLUSION

Justice Stevens recently stated, "[n]either a trespass on private property nor an assault against an individual need be characterized as speech in the Constitutional sense."^{61/} It has never been supposed that, when a criminal is motivated by an invidious idea or philosophy in carrying out his or her criminal purpose, the motivating idea or philosophy is somehow beyond examination for the purpose of determining an appropriate punishment. *A fortiori*, there can be no such limitation where the effects of the conduct in question are as devastating and as widespread as the effects of bias crimes. For all of the

^{60/} This Court consistently has refused to employ the First Amendment to shield unlawful conduct from regulation. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding a law which gives the state authority to close an adult book store when prostitution takes place at the location); *United States v. O'Brien*, 391 U.S. 367 (1968) (prohibition of draft-card destruction is constitutional, notwithstanding any expressive component).

^{61/} *The Freedom of Speech*, remarks of John Paul Stevens, Associate Justice, United States Supreme Court at Yale Law School, Oct. 27, 1992.

foregoing reasons, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

Henry J. Silberberg
Counsel of Record

Mark Solomon

Brian Levin

Stroock & Stroock & Lavan

2029 Century Park East, 18th Floor

Los Angeles, California 90067

(310) 556-5800

Attorneys for Amici Curiae

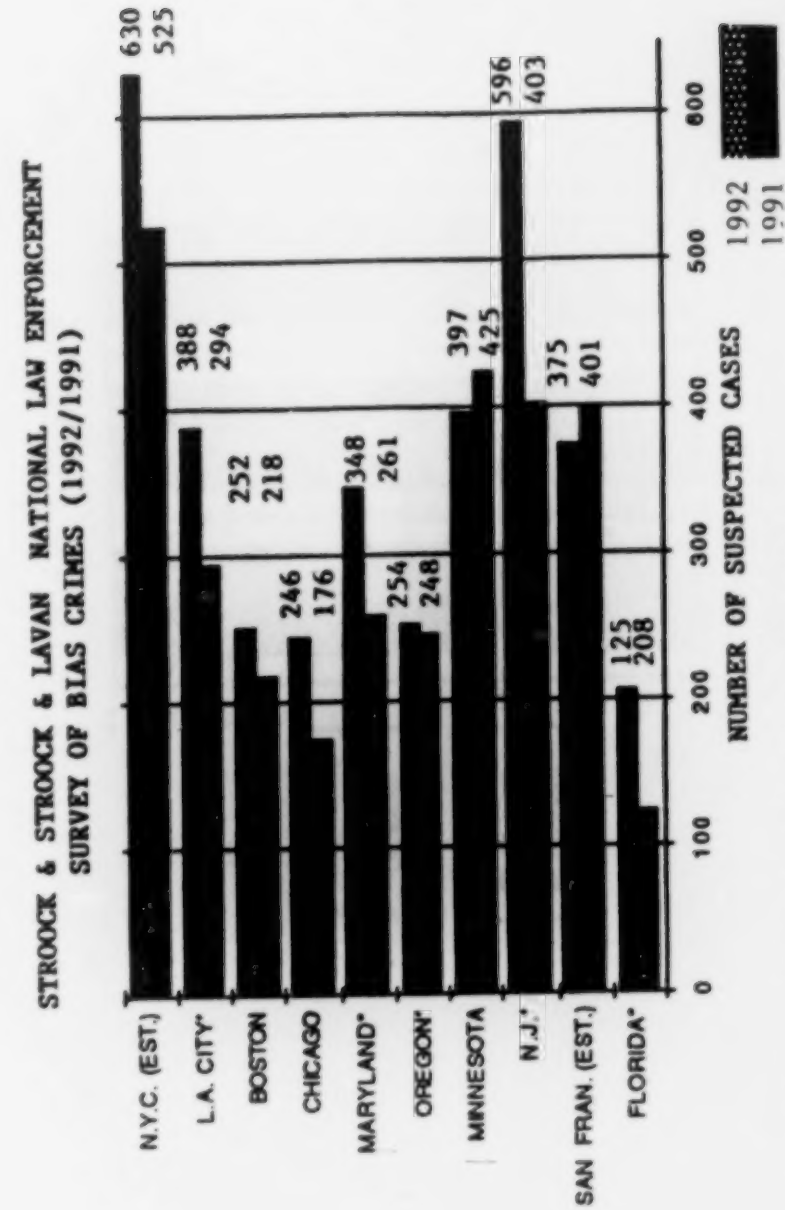
APPENDIX

Stroock & Stroock & Lavan National Law Enforcement Survey Of Bias Crimes 1992/1991	A1
The Relative Frequency Of Person/ Property Attacks Of Various Bias And Non-Bias Crimes	A2
Comparison Of Bias And Non-Bias Crimes	A3
The Impact: A Pattern Of Attacks	A4
The Conflict Generating Potential Of Bias Crimes, The Bronx	A5
Backlash -- New York City Bias Crimes In Wake Of Howard Beach Homicide	A6
Boston Bias Crimes By Type 1978-1991	A7
Bias Crimes Classified By Reason Given	A8
Disproportionate Impact Of Bias Crimes By Race (Pennsylvania 1992)	A9

APPENDIX

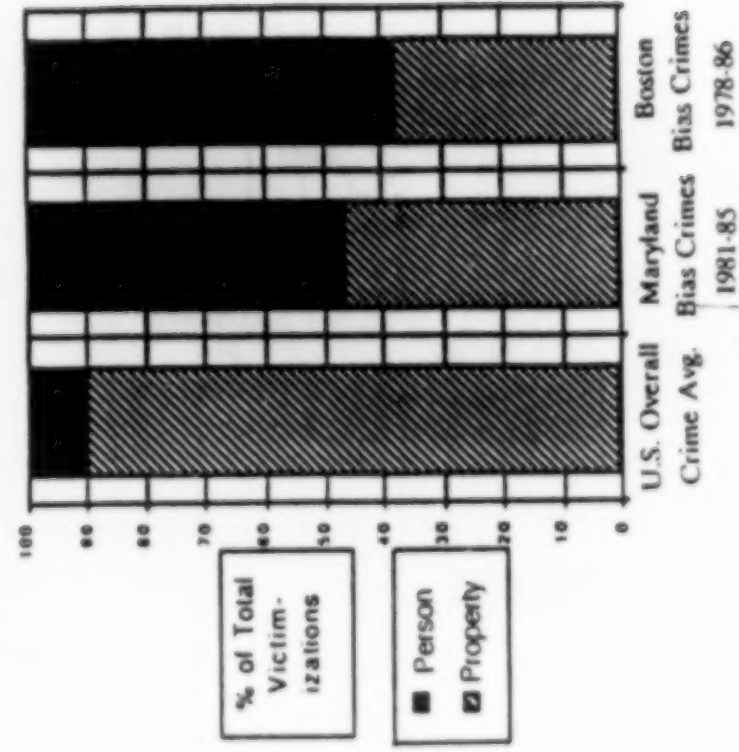
Bias Crime Victims By Age: New Jersey (1991)	A10
Negative Psycho-Physiological Symptoms/Defensive Behavioral Changes By Victimization	A11
Percentage Of United States Population Experiencing Bias Abuse In One Year	A12
Bias Victimization Study (Maryland 1986)	A13
Klanwatch Letter (1/22/93)	A14
Description Of The <i>Amici Curiae</i>	A15

A-1



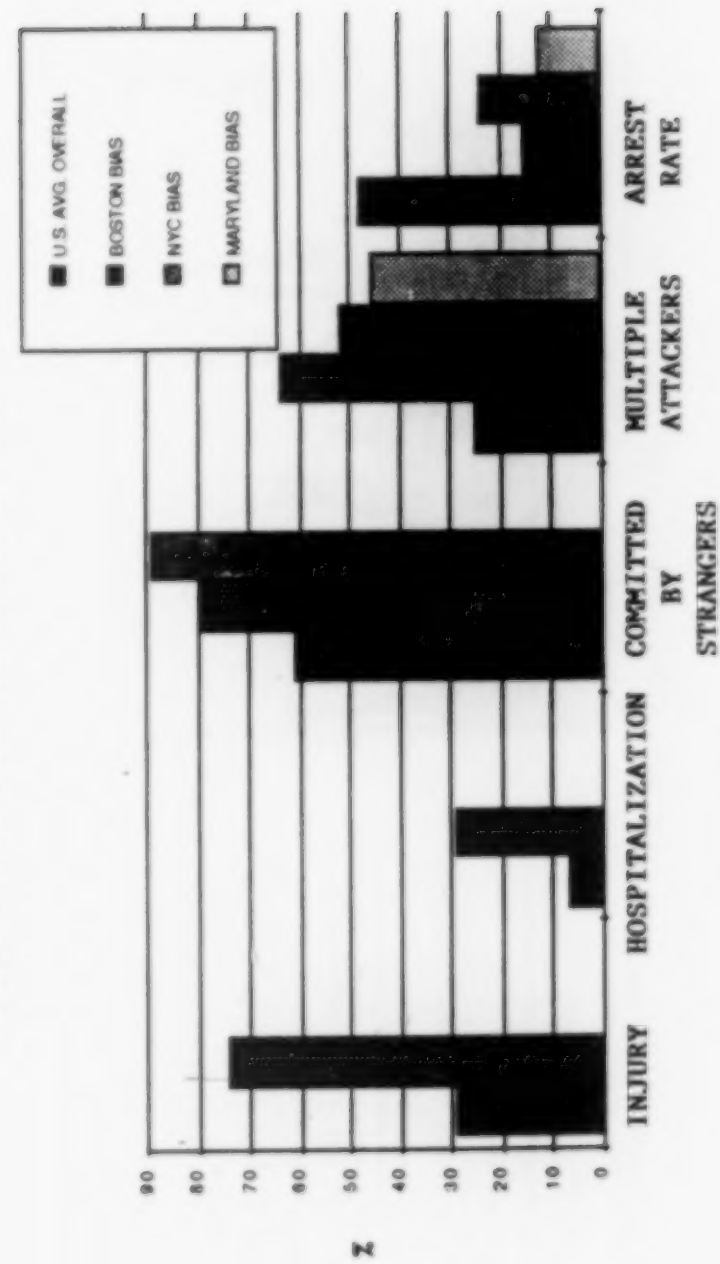
NOTE: See Full Report For Details
*Refers to partial year comparisons. Many figures are provisional.
To the extent possible definitions have been standardized.

THE RELATIVE FREQUENCY OF PERSON/PROPERTY
ATTACKS OF VARIOUS BIAS AND NON-BIAS CRIMES



Source: FBI Crime in The United States 1985, Maryland State Police Criminal Intelligence Division, Boston Police Department-Community Disorders Unit, Incident Breakdown

COMPARISON OF BIAS AND NON-BIAS CRIMES

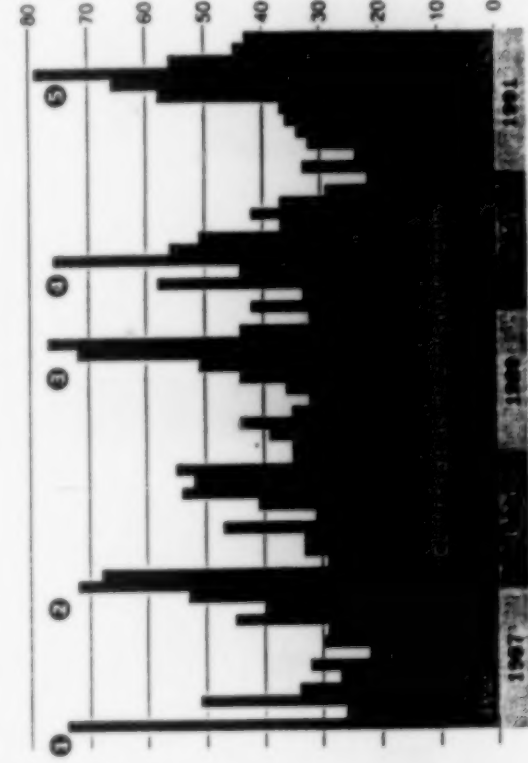


THE IMPACT

A Pattern of Attacks

Reports of bias attacks tend to peak shortly after a widely publicized incident.

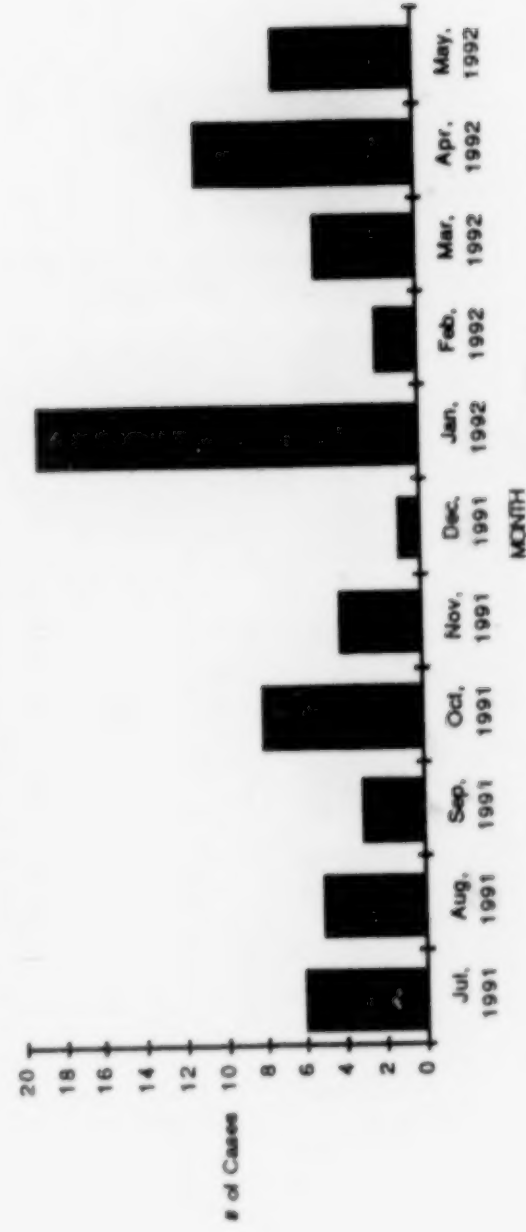
1. Dec. 20, 1986 Michael Griffith, a black man, is killed in Howard Beach, Queens, as he is chased onto a highway by a group of white men.
2. Nov. 28, 1987 Tawana Brawley is found in Wappingers Falls, N.Y., with racial slurs written on her torso. Law-enforcement officials later say her report of assault by six white men is a hoax.
3. Aug. 23, 1989 Yusuf Hawkins, a black teen-ager, is confronted by a gang of white teen-agers and shot in Bensonhurst, Brooklyn.
4. April and May 1990 A dispute between a Korean grocer and a black customer in the Flatbush section of Brooklyn provokes demonstrations.
5. Aug. 19, 1991 A Jewish driver loses control of his car in Crown Heights, Brooklyn, killing a black child.



Source: New York City Police Department

© 1992 New York Times. Reprinted With Permission. All Rights Reserved

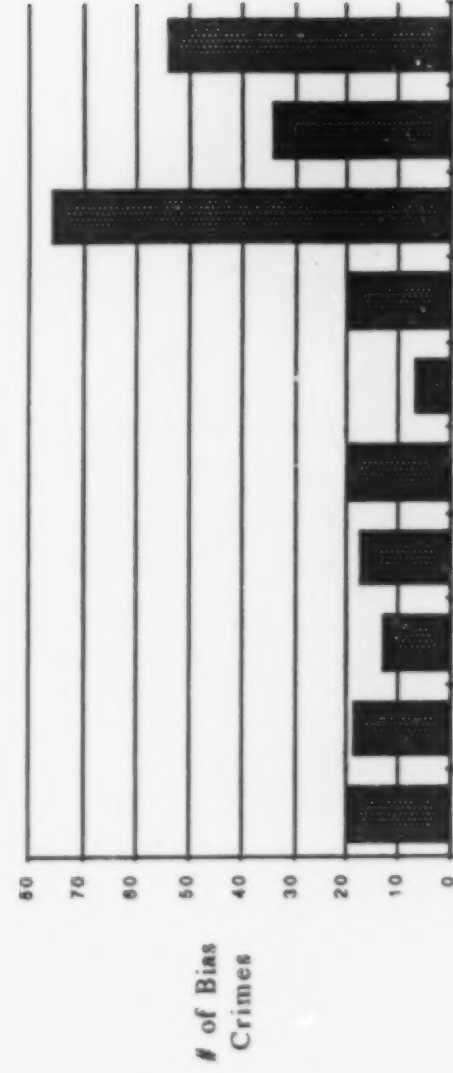
THE CONFLICT GENERATING POTENTIAL OF BIAS CRIMES
The Bronx, New York 1991-1992



NOTE: "Trigger" Incident Took Place In January 1992

Source: New York City Police Department

BACKLASH - NEW YORK CITY BIAS CRIMES IN
WAKE OF HOWARD BEACH HOMICIDE



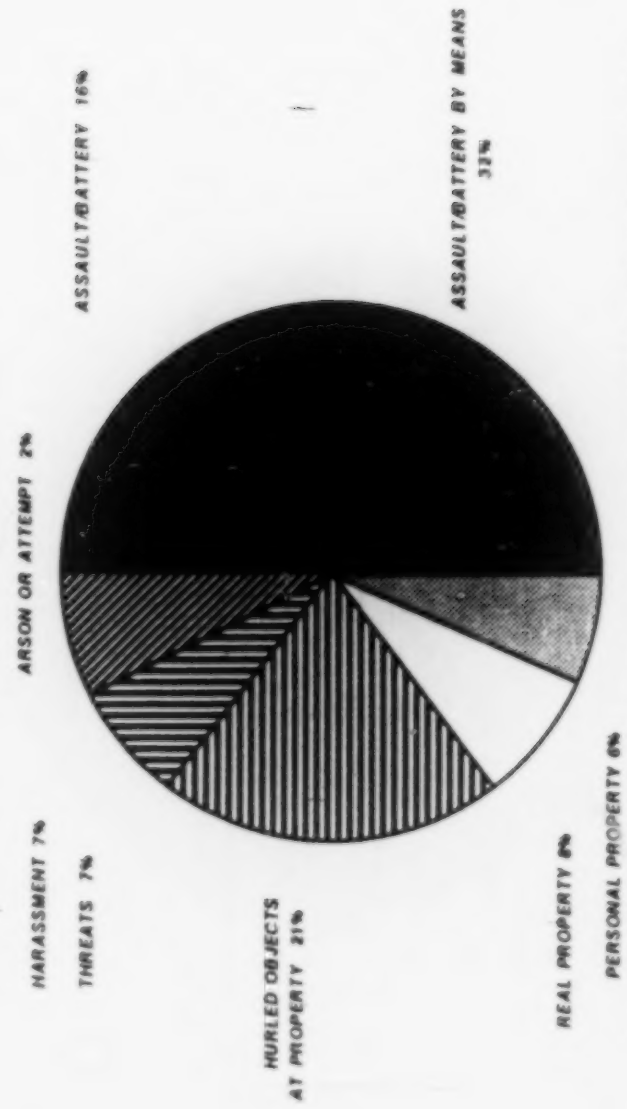
Jan. Jan. Feb. Mar. Nov. Dec. Dec. Jan. Feb. Mar.
1985 1986 1986 1986 1986 1-20 21-31 1987 1987 1987
1986 1986

Chart from Levin, A Practical Approach to Bias Crimes II (1993)

Howard Beach attack occurred Dec 20, 1986.
This graph shows the explosive nature of these incidents.

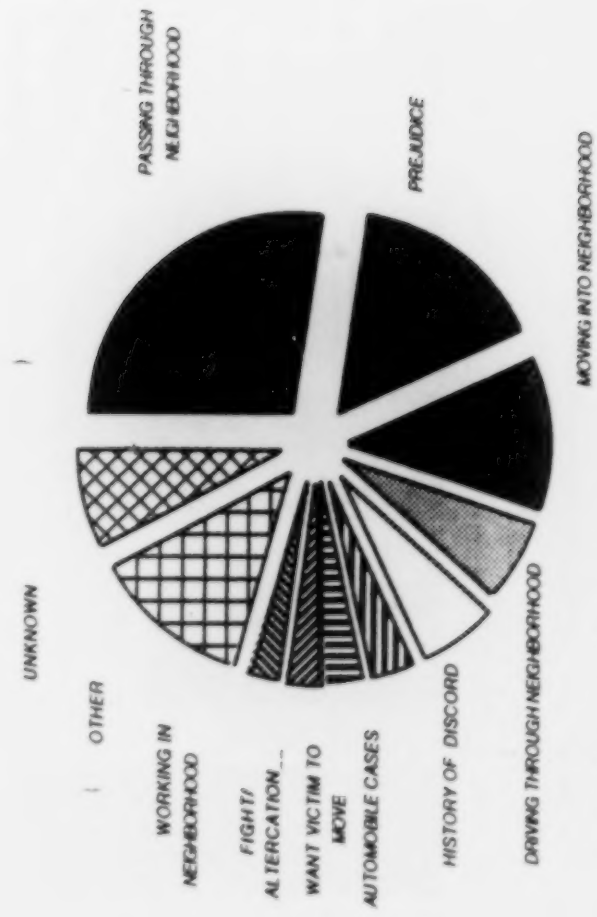
Source of Data: New York City Police Dept.

BOSTON BIAS CRIMES BY TYPE 1978 - 1991



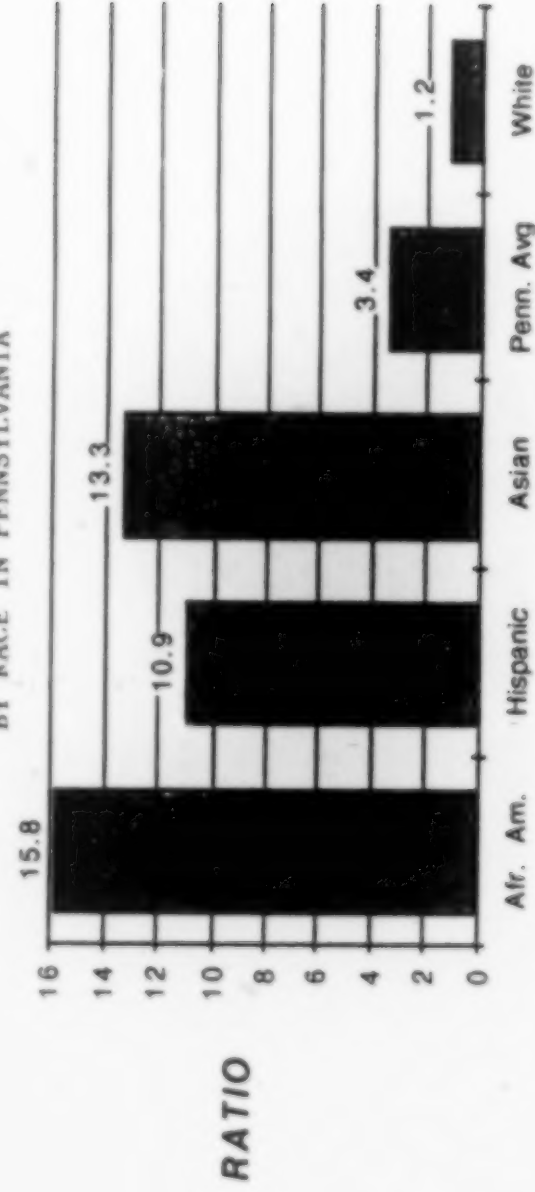
Source: Boston Police Department Community Disorders Unit.
 Chart reprinted courtesy of Stanford Law & Policy Rev.

BIAS CRIMES CLASSIFIED
BY REASON GIVEN



SOURCE: The McDevitt Study at Table V

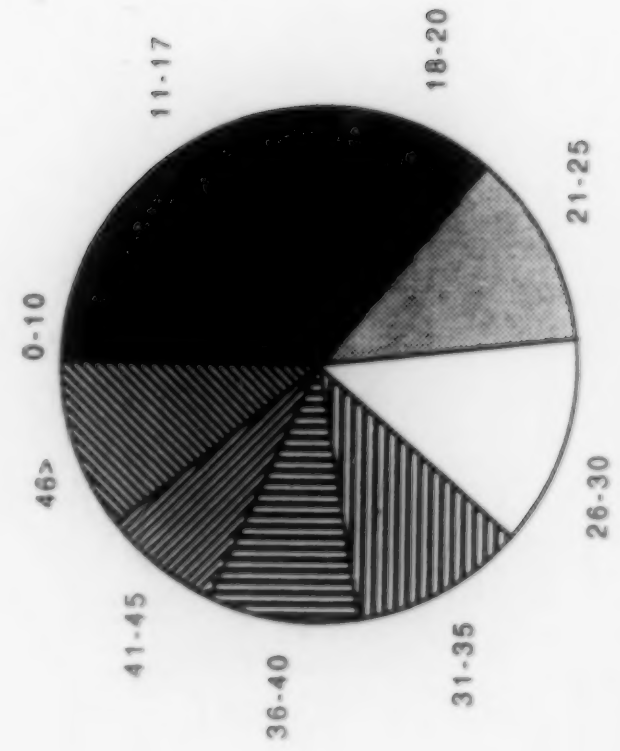
DISPROPORTIONATE IMPACT OF BIAS CRIMES
BY RACE IN PENNSYLVANIA



RACE

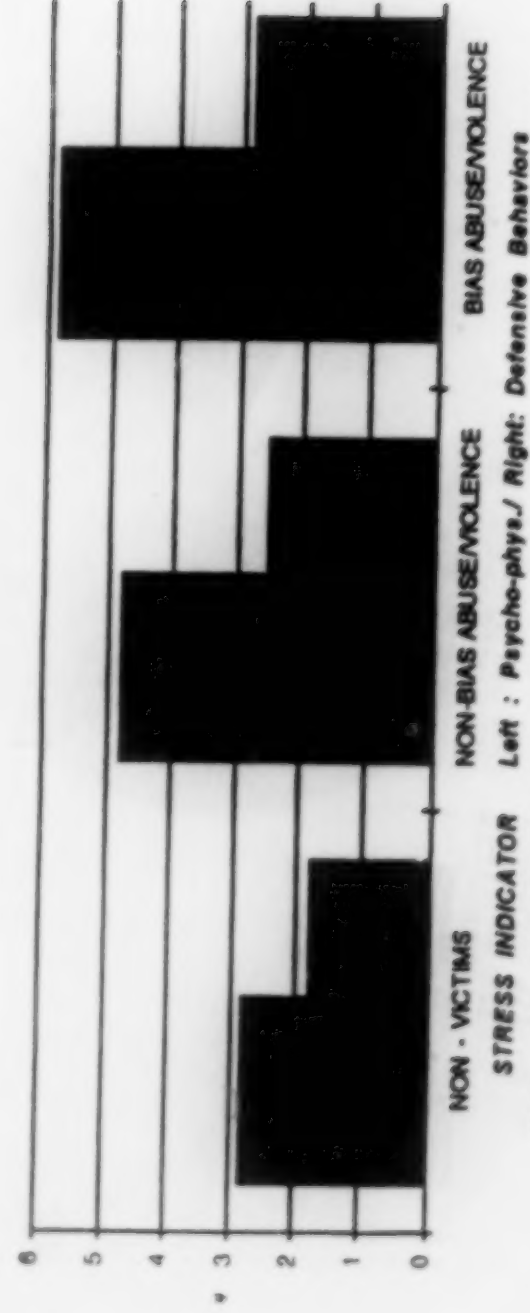
NOTE: Numbers Reflect victimizations Per 100,000 people.
SOURCE: Pennsylvania Attorney General, Hate Crimes
Report 1990-1992 (1992)

BIAS CRIME VICTIMS BY AGE
NEW JERSEY (1991)



SOURCE: New Jersey State Police, 1991
Bias Incident Report 7 (1992)

NEGATIVE PSYCHO-PHYSIOLOGICAL SYMPTOMS /
DEFENSIVE BEHAVIORAL CHANGES
BY VICTIMIZATION

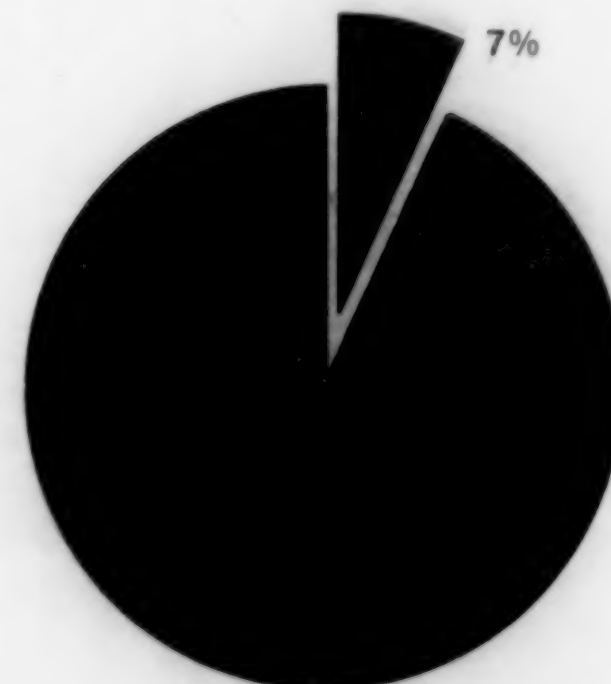


NOTE: The study measured the number of physiological and psychological stress factors along with the number of behavioral changes that individuals experience in different circumstances.

Source: National Institute Against Prejudice & Violence.

A-12

PERCENTAGE OF UNITED STATES POPULATION
EXPERIENCING BIAS ABUSE IN ONE YEAR



NOTE: Includes Criminal and Non-Criminal Incidents

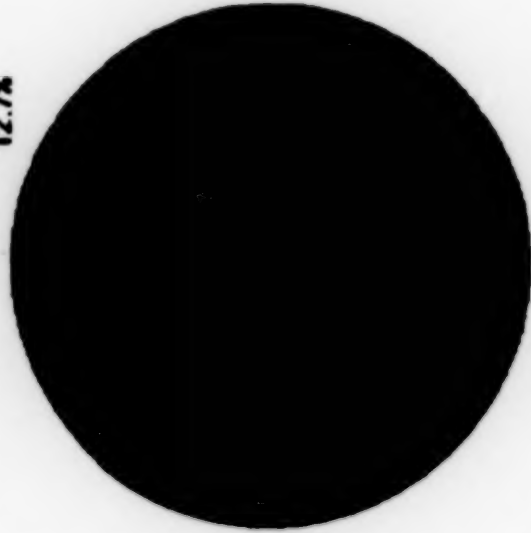
SOURCE: National Victimization Survey, 1989

BIAS VICTIMIZATION SURVEY
(MARYLAND 1986)

Have you yourself ever been the target of property destruction or have been harassed, threatened or physically hurt for what you would consider racial, ethnic or religious reasons?

TOTAL BASE SAMPLE 1135 RESPONDENTS
12.7%

TOTAL BLACK BASE SAMPLE 449 RESPONDENTS
17.1%



A-13

Source: Maryland Survey II, Report to the Governor's Task Force on Violence & Extremism. Chart from Levitt, "Blacks & Racial Bias" (1987).

A-14

KLANWATCH

A PROJECT OF THE SOUTHERN POVERTY LAW CENTER

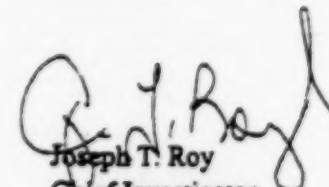
400 WASHINGTON AVENUE • MONTGOMERY, AL 36104
205/264.0240 • FAX 205/264.0620

January 22, 1993

Dear Mr. Levin,

The Klanwatch Project's annual report, to be published in February, 1993, will contain research showing bias homicides have increased for the fourth consecutive year. The report will also show an increase in the number of Ku Klux Klan groups for the second consecutive year.

Sincerely,


Joseph T. Roy
Chief Investigator
Klanwatch Project

DESCRIPTION OF THE *AMICI CURIAE*

The California Association of Human Rights Organizations ("CAHRO") is a state-wide network of human rights and human relations associations. Its purpose is to promote full acceptance of all persons in all aspects of community life without regard to any arbitrary definition of differences; to engage in activities designed to protect basic human and civil rights; to participate in the development of public policy related to human and civil rights; and to serve as a resource in the resolution of inter-ethnic and inter-group conflicts. The municipalities and areas in which CAHRO's member organizations are located represent approximately 2/3's of the population of the State of California.

The Center for Democratic Renewal ("CDR") is a national nonprofit, tax-exempt clearinghouse for information on constructive non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today, the CDR conducts programs of research leadership training, community organizing, public education and litigation. With offices in Atlanta, Georgia; Kansas City, Missouri and Seattle, Washington, the CDR also aids the victims of bigoted violence through telephone counseling and emergency assistance. The CDR serves a diverse national constituency of more than 10,000 members and supporters throughout the United States.

Community United Against Violence ("CUAV") is a 13 year old San Francisco-based nonprofit organization dedicated to preventing violence against lesbians and gay

men as well as providing direct services to treat the victims of hate violence against lesbians and gay men. CUAV programs involve victim support, education, and community outreach. CUAV is one of the first organizations of its kind in the United States.

The Human Rights/Fair Housing Commission of the City and County of Sacramento is a government agency responsible for inter-group relations and the maintenance of equal opportunity in such areas as employment and housing.

The International Association of Official Human Rights Agencies is the nonprofit association of statutory human rights and human relation agencies primarily located in the United States and Canada. The United States member agencies are responsible for enforcing a variety of state and local civil rights laws in their respective jurisdictions. Many of the member agencies have responsibility for monitoring, investigating and/or, through educational outreach programs, combatting bias crimes and underlying inter-community tensions which lead to such crimes. A number of the agencies act as advocates for the victims of bias crimes and provide assistance in dealing with the emotional and psychological impact of such crimes. Some member agencies provide training to law enforcement officers in identifying, investigating and resolving bias crimes.

The Los Angeles County Commission on Human Relations is a government agency that was founded in 1944. It is one of the oldest human relations agencies in the United States. Its primary mission is to promote

improved human relations, civic peace, inter-group understanding, and the full acceptance of all persons in all aspects of community life. It is also the Commission's objective to reduce and eventually eliminate inter-group violence, conflict, and tension, as well as discrimination and prejudice based upon race, religion, sex, sexual orientation, national origin, age, disability, or any arbitrary factor.

The National Association of Human Rights Workers ("NAHRW"), organized in 1947, is composed of individuals who are engaged in human and civil rights work as professionals. The NAHRW encourages collection and sharing of ideas and information on the improvement of inter-group relations as well as the exchange of information and research on dealing with racial, religious and ethnic cultural relations.

The National Victim Center is a nonprofit organization based in Washington, D.C., which works with more than 8,000 victims' rights and criminal law organizations across the country. The Center's mission is to promote responsiveness of the criminal justice system to the rights and interest of victims of violent crime through legislation, litigation, and public policy development. The Center also seeks to heighten public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") founded in 1980, provides counseling and advocacy to men and women who have been victims of anti-gay or anti-lesbian violence, sexual assault, domestic

violence, HIV-related violence and other forms of crime. AVP is the only lesbian and gay identified crime victim service provider in New York State, and the only crime victim agency to devote substantial resources to bias-related violence. During 1991, AVP provided services to survivors in 592 cases of anti-gay/lesbian crime, a 93% increase over 1990.

North Carolinians Against Racist And Religious Violence is a statewide nonprofit organization which monitors white supremacist organizations in the state; provides victim assistance; educates on issues of racism and bigotry; and advocates for changes in public policy.

The Santa Clara County Human Relations Commission is a government agency that advocates for and takes affirmative action to eliminate prejudice and discrimination in Santa Clara County, California, based on race, religion, national origin, cultural background, sex, age, sexual orientation or disability, and to promote peace and harmony in the community between individuals and between groups.